

REMARKS

I. STATUS OF THE CLAIMS

Claims 1-12 are pending and under examination. Applicants have amended claim 1 to indicate that “the yogurt comprises 7% to 14% ~~(m/m)~~ by weight of a homogenized cream, relative to the total weight of the finished product.” The specification supports the amendment of claim 1 at, for example, page 12 (ll. 3-6) and page 20 (ll. 21-23) of the English specification. None of the claim amendments described above introduce new matter.

Applicants acknowledge with appreciation the Office’s withdrawal of the prior rejections under 35 U.S.C. § 102(b), as the Office has not reasserted these rejections in the current Office Action.

The Office newly rejects claims 1-12 under 35 U.S.C. § 112, second paragraph, and maintains the prior obviousness rejections under 35 U.S.C. § 103, in view of *Amen et al.* (WO 89/02702; hereinafter R1) and *Van Dijk et al.* (GB 1,476,309; hereinafter R2). Applicants address these rejections below.

II. REJECTION UNDER 35 U.S.C. § 112, SECOND PARAGRAPH

The Office rejects claims 1-12 under 35 U.S.C. § 112, second paragraph, for reciting the phrase “14% (m/m).” Office Action, p. 2. According to the Office, “[i]t is not clear what is meant by ‘(m/m)’.” *Id.* Applicants respectfully traverse.

The specification fully supports claim 1 at, for example, page 12, lines 5-6. One of ordinary skill in the art, also familiar with the specification, knows that “m/m” means mass/mass. The specification spells out the meaning of “m/m” in various places, including, for example, page 20, lines 18-23 (“the percentages are expressed by mass

relative to the total mass of the finished product.”). Thus, Applicants contend that the meaning of the term “14% (m/m)” is clear and definite.

However, and solely to expedite prosecution, Applicants have amended claim 1 to recite “14% by weight of homogenized cream, relative to the total weight of the finished product.” Weight and mass are used interchangeably throughout the specification. See, e.g., page 12, ll. 3-14 and original claim 6. As this amendment has rendered the Office’s rejection moot, Applicants respectfully request that the Office withdraw it.

III. REJECTIONS UNDER 35 U.S.C. § 103

A. Rejection of claims 1-12 under 35 U.S.C. § 103(a), as allegedly unpatentable over R1.

The Office continues to reject claims 1-12 under 35 U.S.C. § 103(a) as allegedly anticipated by Amen *et al.* (WO 89/02702; herein R1). Office Action, p. 2. The Office contends that “R1 discloses the incorporation of cream into a fermented yogurt.” *Id.*

The Office further contends that:

7. While R1 does not expressly mention using homogenized cream, however, since the product disclosed by R1 is a shelf-stable aerosol dispensable yogurt, the stability disclosed and the homogeneity required by an aerosol dispensable product necessitates the incorporation of homogenized cream. It is also noted that in order to avoid creaming of the fat content when sitting on a shelf, the incorporated cream necessarily is a homogenized cream.

8. Since the stability of the product disclosed by R1 necessitates incorporating a homogenized cream, the free fat globules will intrinsically possess the particle diameter as disclosed. The fat globules associated with the yogurt (protein-fat network) will have the particle size of fat globules in a regular yogurt.

Office Action, p. 3 (emphasis added). Applicants respectfully traverse.

Applicants respectfully submit that the Office has not established a *prima facie* case of obviousness here because the Office has not met the burden of providing reasons for why it would have been obvious to modify R1 in order to obtain the bimodal structure recited in claim 1, upon which all remaining claims depend. First, the MPEP specifies that “[t]he key to supporting any rejection under 35 U.S.C. 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious.” MPEP 2141(III). The Supreme Court in *KSR International Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1741 (2007) confirmed that the analysis supporting such a rejection should be made explicit (citing *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

Indeed, the Office’s basis for maintaining this rejection focuses on the “homogenized cream” element. The Office asserts, but does not explain, why R1 would render obvious the claimed yogurt as a whole. Specifically, the Office simply asserts, without pointing to evidence, that the use of homogenized cream was “necessary” and that the bimodal structure was an “intrinsic” property of R1, even though this reference does not disclose either of these two properties.

Moreover, as is well established, “[o]bviousness cannot be predicated on what is not known at the time an invention is made.” M.P.E.P. § 2141.02. When a patent application claims an invention that works in an unexpected and fruitful manner, the invention is non-obvious. *See KSR Int’l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1740 (2007). Thus, an allegedly “intrinsic” property like the use of homogenized cream would not have rendered the claimed invention obvious.

Second, the Office's argument that R1 "necessarily" incorporates homogenized cream still fails to provide any reason why R1 would have rendered obvious a yogurt in which the cream is homogenized prior to its introduction into the yogurt bulk. Office Action, p. 3. Thus, even if R1 were to suggest homogenizing the final product of R1, which allegation Applicants do not concede, R1 does not teach or suggest homogenization of the cream prior to its addition to the remaining ingredients of the final product. Therefore, the Office has failed to explain how R1 renders obvious the process of claims 6 through 12, wherein the yogurt is prepared from two parts: "from a yogurt bulk and a homogenized cream." See claim 6 (emphasis added).

Third, independent claim 1 recites a "yogurt, characterized in that it has a bimodal structure that comprises fat globules connected to the Protein-Fat mixed network and free fat globules." See, also, Specification, p. 5, ll. 25-36. The Office asserts that "[s]ince the stability of the product disclosed by R1 necessitates incorporating a homogenized cream, the free fat globules will intrinsically possess the particle diameter as disclosed. The fat globules associated with the yogurt (protein-fat network) will have the particle size of fat globules in a regular yogurt." Office Action, p. 3 (emphasis added). The Office further contends that "the product of R1 is necessarily a bimodal structure." Office Action, p. 3 (emphasis added). However, nothing in R1 supports the Office's allegations that R1 teaches the "bimodal structure" of claim 1. Again, the Office appears to use inherency by discussing alleged "necessary" and "intrinsic" features of R1. As Applicants explained above, the MPEP instructs that inherency cannot support an obviousness argument. See above, and M.P.E.P. § 2141.02. The Office has failed to explain how R1 even suggests a composition with

“bimodal structure that comprises fat globules connected to the Protein-Fat mixed network and free fat globules,” much less such fat globules having sizes with bimodal distribution.

In contrast, the Applicants’ specification teaches a homogenization step for the preparation of “homogenized cream,” and that this step takes place prior of the mixing of the homogenized cream with the previously fermented yogurt bulk (source of fat globules connected to a protein-fat mixed network). Specification, pp. 5 (ll. 19-24) and 14-15. The Office has not provided any reason as to why a composition of R1, even one in which the final product (already containing the cream) is homogenized, would produce the same results. Moreover, the Office has not explained why one of skill in the art would have modified R1 and homogenized the cream prior to its addition to a yogurt bulk, nor why the skilled artisan would have had a reasonable expectation of success in achieving the claimed invention.

Moreover, regarding claims 4 and 5, the Office has not explained why an alleged general teaching regarding “flavoring agents” would have rendered the specific flavors of chocolate or vanilla with chocolate chips obvious.

For at least the reasons set forth above, R1 would not have rendered claim 1, upon which claims 2-12 depend, obvious. Applicants therefore respectfully request that the Office withdraw this rejection.

B. Rejection of claims 1-12 under 35 U.S.C. § 103(a), as allegedly unpatentable over R2.

The Office rejects claims 1-12 under 35 U.S.C. § 103(a), as allegedly obvious over R2. Office Action, p. 4. The Office contends:

12. R2 discloses a process in which cream is admixed with an acidified milk product and whipped to produce a whipped topping. (page 1, col. 1, line 31 to col. 2, line 59).

13. While R2 does not expressly mention the incorporation of homogenized cream, in order for a whipped topping to be stable, the cream portion is expected to be homogenized.

14. R2 discloses a formulation where yogurt is mixed with cream to make a whipped topping. (Page 2, Example 2).

18. While the cream and yogurt proportions as disclosed by R2 are slightly different from cream and yogurt proportions as presently claimed, since varying the cream and yogurt proportions would result in different overruns (as disclosed by R2), different whipping properties, different flavors, and different caloric values, one would be motivated to changes those proportions for any of the mentioned reasons. Consequently, the cream and yogurt proportions as presently claimed can be manipulated by those of skill in the art.

Office Action, p. 4 (emphasis added). Applicants respectfully traverse, as the Office has not established a *prima facie* case of obviousness.

First, the Office's argument that "the cream and yogurt proportions as disclosed by R2 are slightly different from cream and yogurt proportions as presently claimed" is incorrect. While claim 1 recites compositions comprising "7 to 14% by weight of homogenized cream, relative to the weight of the finished product," R2 discloses compositions in which the cream component is at least 43% (Example II), and upwards of 63% by weight of the exemplified product (Example I). There is not even overlap between the two disclosures. Moreover, R2's claimed "weight ratio of the cream to the

acidified milk product being in the range of 50:50 to 80:20” teaches away from “7 to 14% by weight of homogenized cream, relative to the weight of the finished product” as recited in claim 1. At the very least, R2’s teaching on this point are not “slightly different” from a “7 to 14% by weight of homogenized cream, relative to the weight of the finished product,” when the finished product is a yogurt. Thus, Applicants respectfully disagree with the Office characterization of R2.

Second, the Office’s only reasoning as to how R2 teaches or suggests the recited element of “homogenized cream” is a conclusory statement that “in order for a whipped topping to be stable, the cream portion is expected to be homogenized.” Office Action, p. 4. However, R2 is silent on what type of cream is used, and in fact R2 itself purports to disclose a new process for making “stable” whipped toppings, relying on something other than the type of cream the process starts with. In fact, none of the examples in R2 teach or suggest starting with homogenized cream, as opposed to pasteurized cream, ultrapasteurized cream, or any other form of cream that the skilled artisan could have chosen from for making the stable whipped topping of R2. Accordingly, R2 would not have rendered claims 1-12 obvious.

In sum, the Office has not set forth any reason why a person of ordinary skill in the art would have had both motivation to modify R2 to achieve the claimed invention and a reasonable expectation of success in doing so. Consequently, for at least the reasons set forth above, the Office has not met its burden of establishing a *prima facie* case of obviousness. See M.P.E.P. § 2143. Applicants respectfully request that this rejection be withdrawn.

IV CONCLUSION

Applicants respectfully request that this Amendment under 37 C.F.R. § 1.116 be entered by the Office, placing claims 1-12 in condition for allowance. Applicants submit that the proposed amendments of claim 1 do not raise new issues or necessitate the undertaking of any additional search of the art by the Office, since all of the elements and their relationships claimed were either earlier claimed or inherent in the claims as examined. Therefore, this Amendment should allow for immediate action by the Office.

Furthermore, Applicants respectfully point out that the final action by the Examiner presented some new arguments as to the application of the art against Applicants' invention. It is respectfully submitted that the entering of the Amendment would allow the Applicants to reply to the final rejections and place the application in condition for allowance.

Finally, Applicants submit that the entry of the amendment would place the application in better form for appeal, should the Office dispute the patentability of the pending claims.

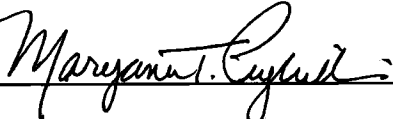
In view of the foregoing remarks, Applicants submit that this claimed invention would not have been rendered obvious in view of the prior art references cited against this application. Applicants therefore request the entry of this Amendment, the Office's reconsideration and reexamination of the application, and the timely allowance of claims 1-12.

Please grant any extensions of time required to enter this response and charge any additional required fees to Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: April 21, 2010

By: 
Maryann T. Puglielli
Reg. No. 52,138
(202) 408-6054